In The

Supreme Court of the United States

69-4

OCTOBER TERM, 1970

NO. 91

JOSEPH ARTHUR ZICARELLI,

Appellant,

vs.

THE NEW JERSEY STATE COMMISSION OF INVESTIGATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF FOR APPELLANT

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Opinion Below

The opinion of the Supreme Court of New Jersey is reported at 55 N.J. 249, 261 A.2d 129 (1970) and appears in the printed appendix at pages 126 to 154. The opinion of the Superior Court, Law Division, Mercer County, is not officially reported and appears in the printed appendix at pages 118 to 123.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 20, 1970. Notice of Appeal, pursuant to Rule 10, was filed on February 2, 1970. The jurisdictional statement was filed on February 16, 1970 and probable jurisdiction was noted on March 1, 1971, limited to questions 1, 2, 3 and 4 as set forth in the jurisdictional statement. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1257(2).

The Constitutional and Statutory Provisions Involved

United States Constitution:

Amendment V —

> No person . . . shall be compelled in any criminal case to be a witness against himself.

Amendment XIV, Section 1 —

> [N]or shall any state deprive any person of life, liberty or property without due process of law . . . .

New Jersey Statutes Annotated. Title 52, Chapter 9M, Section 17 (L. 1968, c. 266, §17) —

> a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence

of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or upon any investigation, proceeding or trial against him for such contempt.

Sections 9M-1 to 9M-18 are set out at length in Appendix A hereto.

Questions Presented

1. Whether appellant's commitment for contempt as a result of his refusal to answer self-incriminating questions after a grant of immunity pursuant to a state statute which only prevents the subsequent use of his compelled testimony and evidence derived therefrom but which fails to grant absolute immunity from prosecution by the questioning jurisdiction, violates appellant's rights under the Fifth and Fourteenth Amendments.

2. Whether a state immunity statute which only prevents the subsequent use of compelled testimony if the answers given are "responsive" is so vague as to violate the Due Process Clause of the Fourteenth Amendment.

3. Whether any immunity statute can supplant the Fifth Amendment's self-incrimination privilege with respect to an individual who has a real fear of foreign prosecution.

Statement

Appellant was subpoenaed to appear before the New Jersey Commission of Investigation (hereafter called the Commission), a body created pursuant to New Jersey Statutes Annotated, Chapter 52, Section 9M-1, et seq. (Appendix A hereto). The subpoena stated that the investigation concerned, generally, the enforcement of the law in Long Branch, New Jersey, with particular reference to organized crime and racketeering (2a-4a). In

response to the subpoena appellant appeared before the Commission on July 8, 1969. He was ordered to return on July 10, and, in response to questions asked of him on that date, invoked his privilege against self-incrimination and refused to answer. He was then ordered to reappear on August 20, 1969.

On August 20, 1969, appellant appeared before the Commission and was asked a series of 100 questions (4a-44a). After refusing to answer the first of those questions, appellant was advised that the Commission had granted him immunity, pursuant to N.J.S.A. 52:9M-17, and he was directed to answer the question (12a-17a; 44a). Notwithstanding the purported grant of immunity, appellant persisted in his refusal to answer (17a). Appellant specifically challenged the validity of the immunity provision (11a). Immediately upon completion of the questioning, appellant was served (42a) with a petition (45a-60a) and Order to Show Cause why he should not be adjudged in contempt and committed to the Mercer County Jail until such time as he should purge himself of contempt by testifying as ordered (61a). The Order to Show Cause was returnable forthwith before the Superior Court Judge who had signed it. The petition, which was dated the same date, and signed by the Commission Chairman, stated that appellant had refused to answer the questions asked of him on August 20. Since the petition was served upon appellant while the Commission was still in session and since the questioning of appellant had been done by the Chairman, it was clear that the petition had been prepared before the questioning began and had been signed before the questioning concluded. It was likewise clear that the Order to

Show Cause had been signed before the questioning of appellant was completed.

On September 16, 1969, a hearing was held upon the Order to Show Cause (62a-108a). During the course of the hearing, counsel for the Commission and for appellant agreed to stipulate to certain matters which appellant had sought to prove at the outset of the hearing (65a-66a). These stipulations were as follows:

> (1) That Zicarelli had been the object of very extensive publicity referring to him not only as a racketeer and a member of Cosa Nostra, but also an "internationalist" in crime.
>
> (2) That Zicarelli's activities, associations and reputation are well known to the Commission.
>
> (3) That Zicarelli had been the subject of numerous subpoenas, surveillances and investigations over the past ten years by both federal and state authorities.
>
> (4) That Zicarelli was, by governmental pronouncement, a main or prime target for prosecution.

Appellant sought the opportunity to question the Executive Director of the Commission with a view towards discovering whether the Commission already had some, if not all, of the information which it sought to elicit from appellant (67a-86a). However, that request was denied (86a-90a). Nu-

merous newspaper and magazine articles dealing with appellant and his reputed criminal activities in New Jersey, in other states and in foreign countries, were also placed in evidence at the hearing (90a-102a).

On September 18, legal arguments were concluded, with respect to the validity of the immunity provision (109a-117a) as well as other matters, and the trial judge, rejecting all of appellant's arguments, including his attack on the immunity statute, found him in contempt and ordered him to jail until he should purge himself by answering the questions posed by the Commission (118a-125a).

Appellant's appeal to the Appellate Division of the Superior Court was certified directly to the Supreme Court of New Jersey on its own motion. On January 20, 1970, the Supreme Court, in an opinion by Chief Justice Weintraub, upheld the trial court's contempt order (126a-154a). With respect to the attack on the constitutionality of the immunity statute, N.J.S.A. 52:9M-17, the Court ruled that the Fifth Amendment does not require "transactional immunity" or "immunity from prosecution," but that an immunity from the use of the compelled testimony was sufficient (140a-148a). Concerning appellant's contention that he was not protected against prosecution in a foreign land, the Court held that even if "liability under foreign law were now relevant," the danger of such prosecution in appellant's case was "too imaginary and unsubstantial to sustain a refusal to answer" (148a). The Court also held that the statutory requirement that a witness is only protected from the use of a "responsive"

answer was valid in that it would protect the witness "against answers and evidence he in good faith believed were demanded" (148a).

On March 1, 1971 this Court noted probable jurisdiction limited to questions 1, 2, 3 and 4 as set forth in the jurisdictional statement (155a-156a).

Summary of Argument

Appellant's constitutional privilege against self-incrimination has been violated by his being held in contempt for refusal to answer questions before the New Jersey State Commission of Investigation after having been granted immunity pursuant to N.J. S.A. 52:9M-17. That statute merely provides for immunity from the use of a compelled answer or evidence derived therefrom but fails to provide for absolute immunity against prosecution by the compelling jurisdiction, also called "transactional immunity." Ever since this Court's decision in Counselman v. Hitchcock, 142 U.S. 547 (1892), a witness has been entitled to immunity from prosecution for any transaction to which his testimony relates. That transactional immunity rule has been generally followed by the states, nearly always adhered to by Congress, and has been consistently reaffirmed and reiterated by this Court on numerous occasions. Murphy v. Waterfront Commission, 378 U.S. 52 (1964), did not affect the transactional immunity standard where a single jurisdiction was concerned but merely imposed a use restriction between federal and state governments with respect to testimony compelled by either sovereign. Not only is the transactional

immunity requirement deeply imbedded in our jurisprudence but it also promotes the values, policies and purposes of the self-incrimination clause. Since, under use-immunity, a criminal prosecution may still result based upon "independent" evidence, an individual might find himself prosecuted for a matter concerning which he was forced to give incriminating testimony. Such a result would violate both the letter and the spirit of the constitutional provision. Use immunity also presents enormous practical problems for a witness in attempting to show that a subsequent prosecution was causally related to his compelled testimony, notwithstanding that the state might have the initial burden of showing the absence of taint. The wide dissemination of incriminating testimony, made a virtual certainty here due to the Commission's statutory scheme, will make it nearly impossible, as a practical matter, for a defendant to refute the State's showing of independent origin, particularly after any substantial period of time. Numerous and protracted court hearings would also be invited. Transactional immunity, on the other hand, presents none of these problems since it makes the positions of all parties quite clear.

The immunity statute in question here violates the due process clause of the Fourteenth Amendment by its requirement that immunity only attach to a "responsive" answer. The statute provides no guidelines for determining what is a responsive answer and thus suffers from an unconstitutional vagueness. The interpretation of the Court below, that it protects answers given "in good faith," does not cure the defect.

Appellant made a sufficient showing in the Court below that he had a real fear of foreign prosecution. Such a possibility is now a relevant consideration in evaluating a claim of self-incrimination under the Fifth Amendment. This follows both from Murphy v. Waterfront Commission, 378 U.S. 52 (1964), and from that interpretation of the Fifth Amendment required to meet the realities of modern times. Since no immunity statute, state or federal, can provide for either use or transaction immunity with respect to foreign prosecution, appellant's self-incrimination claim should have been sustained despite the purported grant of immunity.

Argument

Point I

APPELLANT'S INCARCERATION FOR CIVIL CONTEMPT PURSUANT TO AN IMMUNITY STATUTE WHICH ONLY GRANTED IMMUNITY FROM THE SUBSEQUENT USE OF COMPELLED TESTIMONY AND ANY FRUITS THEREOF, BUT WHICH FAILED TO GRANT ABSOLUTE IMMUNITY FROM PROSECUTION, WAS IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

A. Prior decisions of this Court have consistently reaffirmed and reiterated the transactional immunity standard in cases involving a single jurisdiction.

The first federal immunity statute was enacted in 1857 in support of an investigation of charges

that members of Congress were extorting money from private persons interested in certain legislation. That 1857 Act, granting a "transactional immunity" read, in pertinent part as follows:

> "No person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify . . . ." 11 Stat. 155-166 (1857)

Due to the loose phrasing of the statute, which gave immunity merely as a result of testifying before a congressional committee, numerous "immunity baths" took place, Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1572 (1963) and, in 1862, the act was rewritten as follows:

> "The testimony of a witness examined and testifying before either House of Congress or any committee of either House of Congress, shall not be used as evidence in any criminal proceedings against such witness in any court of Justice . . . ." 12 Stat. 333 (1862)

In 1868 Congress passed another immunity statute, following the 1862 formula, which read, in pertinent part, as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be

> given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture." 15 Stat. 37 (1868)

It was this 1868 statute which came before the Court in Counselman v. Hitchcock, 142 U.S. 547 (1892). In that case, Counselman was granted immunity and thereafter questioned concerning certain violations of the Interstate Commerce Act. He refused to answer and was convicted of contempt. In reversing his conviction, this Court held that statute unconstitutional in that it did not protect a witness from the use of his testimony to search out other testimony or witnesses against him. However, noting that the Fifth Amendment "must have a broad construction in favor of the right which it was intended to secure," 142 U.S. at 562, this Court went on to set out what it deemed to be the full extent of the privilege:

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional prohibition, a statutory enactment to be valid must afford absolute immunity against future prosecu-

tion for the offense to which the question relates . . ." 142 U.S. at 585-586 (emphasis added).

That this choice of "transactional immunity," as it has come to be called, was no mistake is made clear by the three state cases upon which the Court expressly relied in making its ruling. 142 U.S. at 585. Emery's Case, 107 Mass. 172 (1871), Cullen v. Commonwealth, 24 Gratt. 624 (Va. 1873) and State v. Nowell, 58 N.H. 314 (1878), all involved state statutes which were struck down due to their failure to accord immunity from prosecution. 142 U.S. at 571-578. Indeed, immediately following the above quoted language the Court specifically said that it was giving its assent "to the doctrine of Emery's Case," 142 U.S. at 586.

The transactional immunity standard set forth in Counselman "has been consistently reaffirmed and reiterated in both holding and dicta ever since, and has never been seriously questioned in a case involving the actions of a single jurisdiction." Piccirillo v. New York, ___ U.S. ___, 27 L.Ed. 2d 596, 609-610 (1971) (Mr. Justice Brennan, dissenting.)

Only four years later, in fact, in Brown v. Walker, 161 U.S. 591 (1896), this Court made it quite clear that the transaction, or "absolute" immunity language in Counselman was no mere inadvertence. In response to Counselman, Congress had passed, in 1893, a broadly phrased immunity statute which provided as follows:

"But no person shall be prosecuted or sub-

jected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise . . . ." Act of February 11, 1893, c. 83. 27 Stat. 443 (1893).

In Brown v. Walker, supra, this Court upheld the constitutionality of this statute by a 5-4 vote. Throughout the majority opinion reliance was placed upon the transactional immunity standard enunciated in Counselman. After quoting the key language from Counselman, 142 U.S. at 585-586, the Court in Brown went on to state:

> "The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify." 161 U.S. at 594

The Court went on to note that if the witness' testimony,

> ". . . operates as a complete pardon for the offense to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595

The four dissenting Justices in Brown felt that even the broad immunity granted by the 1893 Act was insufficient. 161 U.S. at 610-638

In the years following Brown v. Walker, supra, this Court has consistently reaffirmed the absolute or transactional immunity standard of Counselman. Hale v. Henkel, 201 U.S. 43, 67 (1906)

("But if the criminality has already been taken away, the Amendment ceases to apply"); McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); (The statute in question did not provide "complete immunity from prosecution"); United States v. Murdock, 284 U.S. 141, 149 (1931) ("The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination"); Smith v. United States, 337 U.S. 137, 146-147, 150 (1949) (Counselman "established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of the privilege against self-incrimination"; "only absolute immunity from federal criminal prosecution is sufficient to compel the desired testimony"); United States v. Bryan, 339 U.S. 323, 336 (1950). (A witness who is offered only "use" immunity, "rather than complete immunity from prosecution for any act concerning which he testifies may claim his privilege and remain silent with impunity.")

In the light of this continuous reaffirmation of Counselman's transactional immunity standard for over half a century, it is not surprising that in Ullman v. United States, 350 U.S. 422, 438 (1956), Mr. Justice Frankfurter was able to state that the language of the 1893 statute "has become part of our constitutional fabric." [1]

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1. Ever since Counselman virtually every federal immunity statute has provided for absolute immunity against prosecution in language which has become known as transactional immunity

(Cont'd)

In that case this Court reaffirmed the conclusion of the majority in Brown v. Walker, 161 U.S. 591 (1896), that Congress could override the privilege against self-incrimination by a statute granting transactional immunity. Mr. Justice Douglas and Mr. Justice Black, dissenting, would have overruled Brown v. Walker, supra, and adopted "the view of the minority in that case that the right of silence created by the Fifth Amendment is beyond the reach of Congress." 350 U.S. at 440-453. See Piccirillo v. New York, ___ U.S. ____ 27

(Cont'd)

(immunity from prosecution "for or on account of any transaction, matter or thing" concerning which the witness is compelled to testify or produce evidence). See Ullman v. United States, 350 U.S. 422, 438 (1956); 8 Wigmore, Evidence, sec. 2281 (McNaughton rev. 1961); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege; New Developments and New Confusion, 10 St. Louis U.L.J. 327, 371 (1966); Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568, 1611 (1963). The most recent such statute may be found in 82 Stat. 216, 18 U.S.C. §2514, (1968). The first major enactment to deviate from that tradition, the Organized Crime Control Act of 1970, 18 U.S.C. §6001-6003, was recently held unconstitutional, under Counselman, in In the Matter of the Grand Jury Testimony of Joanne Kinoy, ____ F.S. ____ (D.C. S.D.N.Y. 1971).

Likewise, even prior to Malloy v. Hogan, 378 U.S. 1, (1964), the vast majority of state cases adhered to the transactional immunity requirement. Annotation, Incriminating Disclosures—Immunity, 53 A.L.R. 2d 1030, 1032 (1957); State v. Prato, 2 Ohio, App. 2d 115, 206 N.E. 2d 917 (Ct. of App. 1965); State v. Kirtley, 327 S.W. 2d 166 (Sup. Ct. Mo. 1959). In addition, the Commissioners on Uniform State Legislation have suggested transactional immunity as the standard to be followed by the states, Model State Witness Immunity Act, 9 U.L.A. 186, et seq. (1957). All of the state and federal statutes are collected in an appendix to the Brief For Petitioner filed in Piccirillo v. New York, ____ U.S. ____, 27 L.Ed. 2d 596 (1971).

L.Ed. 2d 596, 608 (1971) (Mr. Justice Brennan, dissenting). It is clear that at this critical juncture the Court was under no misapprehension concerning the necessity of a transactional immunity standard, for over a decade earlier in United States v. Monia, 317 U.S. 424, 434 (1943), Mr. Justice Frankfurter, in referring to Brown v. Walker in his dissenting opinion said:

> "There was no indication [in Brown] of any belief that Congress had given anything more than it had to give — and, indeed, only a bare majority of the Court thought that the statute had given as much as the Constitution had required."

The Supreme Court of New Jersey, in sustaining the validity of the use immunity granted by N.J.S. 2A:52:9M-17, proceeded upon the view that Murphy v. Waterfront Commission, 378 U.S. 52 (1964), had dealt a fatal blow to transactional immunity. In re Zicarelli, 55 N.J. 249, 268-270, 261 A.2d 129, 137-140 (1970); Uniformed Sanitation Men Association, Inc., v. Commissioner of Sanitation of the City of New York, 426 F.2d 619, 624 (2nd Cir. 1970).[2] In that view, however, the Court was clearly in error.

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2. Other cases since Murphy expressing a similar view are United States ex rel. Ciffo v. McCloskey, 273 F.Supp. 604 (S.D.N.Y. 1967); Application of Longo, 280 F.Supp. 185 (S.D. N.Y. 1967); People v. La Bello, 24 N.Y. 2d 598, 301 N.Y.S. 2d 544, 249 N.E. 2d 412 (Ct. of App. 1969), cert. granted sub nom Piccirillo v. New York, 397 U.S. 933 (1970, dismissed as improvidently granted ___U.S.___ 27 L.Ed. 2d 596 (1971); Byers v. Justice Court for Ukiah Judicial District, 80 Cal. Reptr. 553, 458 P.2d 465, 472 (Sup. Ct. 1969), cert. granted, California v. Byers, 397 U.S. 1035 (1970).

Murphy held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him," and that, in order to implement this rule "the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." 378 U.S. at 79. It should be noted, at the outset, that the immunity statute involved in Murphy was one which did grant the witness transactional immunity under the laws of the compelling sovereign. 378 U.S. 53 Murphy was involved solely with the accomodation in federal-state relations made necessary by the Court's ruling, on that same day, in Malloy v. Hogan, 378 U.S. 1 (1964), that the Fifth Amendment provision againhst self-incrimination was applicable to the states. It can hardly be assumed that this Court repudiated, sub silentio, as important and long-standing a doctrine as that of transactional immunity in a case where the issue was never in focus and where, on the contrary, Counselman was cited with approval. 378 U.S. at 54. But see 378 U.S. at 92-107 (concurring opinion of Mr. Justice White). As noted above, Murphy was decided on the same day as Malloy which extended the Fifth Amendment self-incrimination privilege to the states. It is difficult to believe that this Court would widen the applicability of the privilege, on the one hand, while restricting its scope, on the other. The more reasonable interpretation is that Murphy,

> ". . . broadened rather than restricted the protection of the Fifth Amendment's privilege against self-incrimination. The reason the

> Court extended the protection of the privilege in a cross-jurisdiction situation only to use of the compelled testimony and its fruits and not to prosecution immunity was out of considerations of federalism. Thus it minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." In the Matter of the Grand Jury Testimony of Joanne Kinoy, ___ F.S.___ (D.C.S.D. N.Y. 1971)

A similar view was expressed by Professor Mansfield when he said:

> "It does not follow that because the Murphy result is appropriate in the adjustment of federal-state relations that it will also apply when only a single jurisdiction is involved. Murphy did not hold that it would satisfy the privilege if the jurisdiction demanding incriminating information only gave assurances that it would not make prosecutory use of the information, and did not give immunity from prosecution for the matters disclosed." Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and The Government's Need for Information, 1966 Supreme Court Review, 103, 164-166

That Murphy did not decide the issue involved in this case is made most clear by several opinions in the years following. In Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), this Court, in a unanimous opinion, held that the immunity granted by §4(f) of the Subversive Activities Control Act of 1950, 64 Stat.

992, 50 U.S.C. §783 (f), was invalid under Counselman. This Court specifically noted that Counselman required "absolute immunity against future prosecution for the offense to which the question relates. 382 U.S. at 80. In Stevens v. Marks, 383 U.S. 234 (1966), both Mr. Justice Douglas, writing for the majority, 382 U.S. at 244-245, and Mr. Justice Harlan, concurring in part and dissenting in part, 382 U.S. at 249-250, specifically noted that the question was still open. In the light of these post-Murphy expressions it cannot seriously be thought, as did the court below, that a passing reference to use immunity in Gardner v. Broderick, 392 U.S. 273, 276 (1968), has settled the problem. Just this term both Mr. Justice Brennan and Mr. Justice Douglas have likewise made it clear that Murphy did not resolve the matter. Piccirillo v. New York, ____ U.S. ____ 27 L.Ed. 2d 596, 599, 605, (1971) (dissenting opinions). As of today the transactional immunity requirement remains unimpaired and firmly embedded in our jurisprudence. The question remains whether the established rule should be left undisturbed.

B. The language of the Fifth Amendment and the values which it serves compel a transactional immunity standard.

In his recent dissenting opinion in Piccirillo v. New York, ____ U.S. ____ 27 L.Ed. 2d 596, 606 (1971), Mr. Justice Brennan pointed out that mere use immunity, "satisfies neither the language of the Constitution itself, nor the values, purposes, and policies which the privilege was historically designed to serve and which it must serve in a free country." Appellant can do no

better than to adopt those arguments in this case.

With respect to the words of the privilege, Mr. Justice Brennan pointed out that the self-incrimination clause "prohibits the application vel non of compulsion to an individual to force testimony which incriminates him, regardless of whether he is actually prosecuted." 27 L.Ed. 2d at 607 Since the reach of the privilege is the possibility of a criminal charge and not whether one is in fact brought, it is only when there is no possibility of a criminal case that the privilege ceases to apply. Thus, if one has been pardoned or if the statute of limitations has expired, for example, the demands of the clause would be satisfied. Mere use immunity, however, does not provide these safeguards. Under such an immunity, Mr. Justice Brennan pointed out, the individual is still being compelled to testify against himself in a situation were there remains the possibility of a criminal case relating to that very testimony. The fact that the criminal case may not be based upon that compelled testimony does not avoid the problem. The individual is "still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony." Thus, use immunity "permits the compulsion without removing the criminality." 27 L.Ed. 2d at 609.

Use immunity fares no better when the policies, purposes and values of the privilege are considered. As Mr. Justice Frankfurter stated in Ullman v. United States, 350 U.S. 422, 426 (1956), "[t]his constitutional protection must not be interpreted in a hostile or niggardly spirit." Among the values which the privilege serves are the

following:

> "[O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege while sometimes 'a shelter to the guilty,' is 'often a protection to the innocent.'" Murphy v. Waterfront Comm'n., 378 U.S. at 55 (citations omitted).

There can be no doubt that many of these values are offended by the application of the use-immunity statute in this case. Appellant has certainly been subjected to the "cruel trilemma of self-accusation, perjury or contempt." Having once chosen contempt he is to remain imprisoned for the rest of his life if he adheres to that stand. That "sense of fair play" which requires a "government to leave the individual alone until good cause is shown for disturbing him" surely recoils at the situation below where appellant's interrogators took the position that even if they had

the answers to all of the questions asked of the witness the Commission would still be entitled to hear the incriminatory answers "from the horse's mouth" (84a). Where the government seeks to play these cruel games upon an individual more than use immunity should be offered. As Mr. Justice Brennan has pointed out in Piccirillo, use immunity does not leave the individual and the state in the same position as if the witness had not testified. The individual has been compelled to incriminate himself and remains liable to prosecution, while the state has gained information which may help it in its investigations and which may, if pursued long enough, produce evidence sufficiently "independent" to permit prosecution of the individual for the very crime about which incriminating testimony has been compelled. 27 L.Ed. 2d at 608-609. This is surely not conducive to a "fair state-individual balance." See In the Matter of the Grand Jury Testimony of Joanne Kinoy, ____ F.S. ____ (D.C. S.D. N.Y. 1971).

The words of Judge Magruder concerning the self-incrimination privilege in Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954) are particularly appropriate here:

> "If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion."

C. Compelling practical considerations support retention of the transactional immunity standard.

Despite the fact that under a use immunity statute the government would undoubtedly have the burden of establishing, in a subsequent prosecution, that its evidence was untainted, Murphy v. Waterfront Commission, 378 U.S. 52, 79 footnote 18, (1964), enormous practical difficulties would still remain,

> ". . . in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or from an 'independent source' Piccirillo v. New York, ____ U.S. ____, 27 L.Ed. 2d 596, 609, (Mr. Justice Brennan, dissenting).

These practical problems, noted as long ago as in Brown v. Walker, 161 U.S. 591, 622 (1896), (Mr. Justice Shiras, dissenting), are both numerous and compelling. As Mr. Justice Brennan said in Piccirillo, supra, at 609:

> "In dealing with a single jurisdiction, we ought to recognize the enormous difficulty in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or from an 'independent source.' For one thing, all the relevant evidence will obviously be in the hands of the government — the government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend upon assumptions of misconduct or

collusion among government officers. It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction which compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved."

The situation hypothesized by Mr. Justice Brennan, involving "one jurisdiction with presumably adequate exchange of information among its various law enforcement officers," has become a cold reality in this case. The statute governing the State Commission of Investigation provides as follows:

(1) "Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the Commission shall cooperate with, advise and assist them in the per-

formance of their official powers and duties." N.J.S.A. 52:9M-5

(2) "The Commission shall cooperate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this state." N.J.S.A. 52:9M-6

(3) "The Commission shall inquire into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States." N.J.S.A. 52:9M-7

(4) "Whenever it shall appear to the Commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public official." N.J.S.A. 52:9M-8

As a result of these four provisions, which appear, for the most part, to be mandatory in nature, it is a virtual certainty that not only will there be an "adequate exhance of information" among law enforcement officers, both within the jurisdiction and without, but that the compelled incriminating information will receive as wide a dissemination as possible. This both heightens the likelihood of eventual prosecution and increases the burden upon a defendant seeking to show a connection with the

compelled testimony. As Mr. Justice White has noted, "where there is only one government involved . . . not only is the danger of prosecution more imminent" but "the likely purpose of the investigation [is] to facilitate prosecution and conviction . . . ." Murphy v. Waterfront Commission, 378 U.S. 52, 98 (1964) (Concurring opinion) Nor does the fact that, technically, the burden may be upon the Government, solve the problems involved. Note, 61 Northwestern U.L. Rev. 654, 663-666 (1966). As Judge Motley has recently said:

> "To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case." In the Matter of the Grand Jury Testimony of Joanne Kinoy, ____ F.S. ____ (D.C.S.D.N.Y.).

In commenting upon the practical problems involved in use-immunity, Professor Mansfield has put the case as follows:

> "As a practical matter, will it be possible to determine whether the government's evidence was obtained independently? Suppose the evidence used to convict has no causal connection with the compelled disclosure other than that it provided the reason for commencing an investigation? It can of course be said that an investigation could have resulted from the mere fact that a person invoked the privilege and declined to answer questions. But when an incrimin-

> ating disclosure has actually been made, a subsequent investigation is, realistically, likely to be more focused. The upshot of a rule restricted to forbidding prosecutory use may be that a person is in fact much worse off in regard to the danger of prosecution and conviction than if he had remained silent." Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Supreme Court Review 103, 165.

As the same author has said, it may turn out that "the theory of protection from prosecutory use is simply a cloud of words behind which the substance of the privilege is lost." Mansfield, supra at 165.

Adoption of a use-immunity standard would also add yet another type of pretrial motion to burden courts already beset by a mounting caseload. As Judge Motley put it, In the Matter of the Grand Jury Testimony of Joanne Kinoy, supra,

> "If the granting government could proceed to prosecute after a witness has testified but would have the burden in every case of proving that its evidence is untainted (especially in the case of the instant Act which is applicable to all federal criminal laws), a motion to suppress the evidence would inevitably follow every such indictment. Assuming that there would be many such cases because of Congress' determination to eliminate transactional immunity, the federal

> district courts would have an automatic new burden of protracted litigation." (Emphasis added.)

Of course, the same may be said concerning what would result in the state courts. See also, Ullman v. United States, 350 U.S. 422, 444 (1955) (Mr. Justice Douglas, dissenting):

> On the other hand,
>
> > "Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony." Piccirillo v. New York, 27 L.Ed. 2d at 609.

It must be kept in mind that we are only dealing here with the extent of the immunity required to be granted by the sovereign seeking to compel the incriminating testimony. It does not necessarily follow that retention of transactional immunity in such a situation would require immunity from prosecution in other jurisdictions, be they state or federal. Different values are involved, the primary

of which is the fact that the compelling authority has the choice of "exchanging immunity for the needed testimony." Murphy v. Waterfront Commission, 378 U.S. 52, 92 (1964) (Mr. Justice White, concurring). Since the compelling sovereign is in a position to judge how much it needs the testimony it is not an unreasonable price to demand that, in exchange, it guarantee the witness against the danger of any criminal prosecution in that jurisdiction. This calls for a calculation by the immunity granting authority that its need for the information overrides the public interest in prosecuting the witness for his crimes. Note, 61 Northwestern U.L. Rev. 654, 660 (1966). The less immediate and less compelling threat of inter-jurisdictional prosecution can be adequately and fairly handled by retention of the Murphy standard.[3] To that extent the fears heretofore expressed by some members of this Court would be eliminated. Murphy v. Waterfront Commission, supra, at 703-712 (Mr. Justice White, concurring); Stevens v. Marks, 383 U.S. 234, 249-250 (1966) (Mr. Justice Harlan, concurring).

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3. See, however, the proposal for "reciprocal immunity" legislation by Hofstader & Levittan, Immunity and the Privilege Against Self-Incrimination - Too Little for Too Much, 39 N.Y.S. Bar J. 105, 111 (1967), and the suggestions for legislation in Note, 20 Rutgers L. Rev. 336, 346-349 (1966).

Point II

IN CONDITIONING THE GRANT OF IMMUNITY UPON THE GIVING OF A "RESPONSIVE" ANSWER, WITHOUT SUPPLYING ANY GUIDELINES FOR THE INTERPRETATION OF THAT CONDITION, THE STATUTE IS RENDERED SO VAGUE AS TO DENY APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

N.J.S.A. 52:9M-17 imposes a condition upon any grant of immunity conferred by the Commission. A witness is protected only if his answer to the question is "responsive."[4] The statute totally fails to set forth any clarifying guidelines as to what is, or what is not, a "responsive" answer. The Supreme Court of New Jersey, in upholding this portion of the statute, summarily held that the provision protects a witness from the use against him of answers and evidence given "in good faith." In re Zicarelli, 55 N.J. at 271, 261 A.2d at 140. Appellant submits that the statute, whether taken on its face or as construed by the court below, is patently violative of the Due Process Clause of the Fourteenth Amendment.

The statute is constitutionally defective under the "void-for-vagueness" doctrine heretofore enunciated by this Court. Forty-five years ago, this Court stated that:

"A statute which either forbids or re-

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4. Our research has failed to reveal any other immunity statute, state or federal, with such a condition.

> quires the doing of an Act in terms so vague that men of common intelligence must necessarily guess as to its application violates the first essential of due process. . . ." Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Accord, Champlain Refining Co. v. Corporation Comm'n., 286 U.S. 210, 243 (1932).

In dealing with a First Amendment question in Smith v. California, 361 U.S. 147, 150-151 (1959), Mr. Justice Brennan said:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech, a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

It is suggested that, considering the historical purposes and values served by the Self-Incrimination Clause, such a "stricter standard" should also be applied to the statute here in question.

The wording of this statute, with its absence of any standard for adjudication as to the meaning of "responsive," produces a chilling and stifling effect upon what would otherwise be an incentive to answer.[5] The record below abundantly supports this proposition. Other than identifying himself, Zicarelli refused to answer any questions put to

5. Assuming the statute were otherwise valid by providing for transactional immunity.

him. This is not surprising when one considers that a "responsive" answer has been defined as one "constituting or comprising a complete answer." Black's Law Dictionary, (4th Ed. 1951). Thus, anything less than the foregoing would be subject to being characterzied as non-responsive and, hence the immunity would not attach. It would be the determination of the Commission, as the operating agency, at least in the first instance, as to whether a given answer was responsive. This would create further problems, by permitting an executive or legislative authority to create its own standards as to responsiveness on an ad hoc basis and to fix varying standards of improper conduct. Cf. United States v. Brown, 381 U.S. 437, 442 (1965).

In dealing with the word "responsive" one must conclude that its ultimate applicability to a given situation would, of necessity, bring into play individual values, vagaries of judgment, and matters of degree. In that respect, the term is no more definite than such standards as "sacrilegious" or "immoral" which this Court has previously struck down as being too vague and indefinite to proscribe rights under the First and Fourteenth Amendments. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1950); Commercial Pictures Corp. v. Regents of Univ. of New York, 346 U.S. 587 (1954). The word "responsive" provides no more guidance than did such phrases as "loitering," "not giving a good account," and "profligateness," all of which led to the demise of the District of Columbia vagrancy statute on the grounds of vagueness. Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968).

As in Champlain Refining Co. v. Corporation Comm'n., 286 U.S. 210, 243 (1932), the standard provided in this case is "so vague and indefinite as to be really no rule or standard at all." The witness cannot have any assurance beforehand that the answer he gives to a question will be more or less than what the interrogator desired. Nor does the problem stop at that point, for the witness might, in any event, be left to the vagaries of a judgment as to responsiveness to be made many years after the questioning by a court unfamiliar with the nature of the present inquiry and with the intent of the questioner. The witness is truly left to answer at his peril, knowing that "litigation on a distant day," Ullman v. United States, 350 U.S. 422, 445 (1955) (Douglas, J. dissenting), may be required to determine if he chose correctly.

The interpretation of the statute by the Supreme Court of New Jersey leaves the witness no better off. The Court subsequently called upon to determine whether an answer was responsive would have to judge the "good faith" of the witness at the time the answer was provided. If a refusal to answer in good faith and on advice of counsel is no defense to a conviction for contumacy, Sinclair v. United States, 279 U.S. 263, 299 (1929), it hardly seems that the "good faith" standard proposed here is any more viable. The standard, as interpreted, remains as vague as it did before.

We are dealing here with a situation wherein government compulsion is being brought to bear upon an individual in order to compel him to testify against himself. When the freedom to remain silent is sought to be removed by an immunity statute, it should only be sanctioned with no strings

attached. See, Petition of Specter, 439 Pa. 404, 268 A.2d 104 (Sup. Ct. 1970). That, appellant suggests, is not too high a price for a sovereign to pay for compelling an individual to break faith with his own conscience. No one should "be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Accord, Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

Point III

AN INDIVIDUAL WHO CAN DEMONSTRATE A GENUINE FEAR OF FOREIGN PROSECUTION BASED UPON ANSWERS SOUGHT TO BE COMPELLED UNDER AN IMMUNITY STATUTE, CANNOT BE COMPELLED TO TESTIFY NOTWITHSTANDING THE SCOPE OF THE IMMUNITY OFFERED.

A. Fear of foreign prosecution is relevant in determining the validity of a Fifth Amendment claim of self-incrimination.

An immunity statute, of whatever scope, and whether enacted by our federal government or a state, is powerless to prevent either prosecution or use of testimony by a foreign sovereign, against the witness compelled to supply incriminating information.

In Murphy v. Waterfront Commission of New York, 378 U.S. 52, (1964), this Court recognized and approved the postulate that a witness has a constitutional right to invoke the Fifth Amendment when he has a demonstrable fear of foreign

prosecution. Appellant recognizes that no such question was before the Court, but, it is suggested that the Court could not have arrived at its specific holding otherwise. Writing for the majority, Mr. Justice Goldberg demonstrated how the Court had erred many years ago. He quoted from United States v. Murdock, 284 U.S. 141, 149 (1931), as follows:

> "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. King of the Two Sicilies v. Willcox . . . Queen v. Boyes . . . ." 378 U.S. at 71-72 (citations omitted).

Mr. Justice Goldberg went on to state:

> "As has been demonstrated, the cases cited were in one instance overruled, and in the other inapposite, and the English rule was the opposite from that stated in this Court's opinion: The rule did 'protect witnesses against disclosing offenses in violation of the laws of another country.' United States of America v. McRae, supra." 378 U.S. at 72 (Emphasis added).

It thus appears that this principle of law was accepted by the majority in Murphy. Our research has disclosed only one other case in point since the decision in Murphy, that being In re Parker, 411 F.2d 1067 (10th Cir. 1969), cert. granted, judgment vacated as moot, sub nom Parker v. United States, 397 U.S. 96 (1970). In that case

the Tenth Circuit held that a witness upon whom immunity had been conferred could not thereafter refuse to answer questions on the ground of fear of self-incrimination under the laws of a foreign nation. The court specifically stated:

> "The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation." 411 F.2d at 1070.

That holding, we submit, cannot be squared with Murphy.

Whatever might have been the realties of a fear of foreign prosecution in another age, there can be no doubt that it has become a substantial threat in our present times. At the beginning of this year the United States was a party to ninety-one bilateral and one multi-lateral extradition treaties. Treaties in Force, (Department of State Publication 8567) (1971). When that fact is taken in conjunction with the world-wide dissemination of information and with the well-known cooperation of police authorities in many nations, there can be little doubt that one who is compelled to incriminate himself with respect to foreign crimes stands in very real fear of ultimate prosecution. The privilege should be viewed in the light of these modern developments, not treated as "an historical relic." Quinn v. United States, 349 U.S. 155, 162 (1954). In DeLuna v. United States, 308 F.2d 140, 151 (5th Cir. 1962), the court had this to say about the self-incrimination clause:

> "Because the right is the result of successive accretions, it is not as severely bounded by historical origins, as are some legal institutions. It is more important to consider its line of growth, as indicative of an expanding right capable of encompassing new and novel situations today as in the past. If the expansion of the individual's right of silence comes at the expense of the power and efficiency of the State, that is but in accord with the nature of the right and its historical development."

Thus, whether based upon sound historical precedent, as Murphy suggests, or upon the realities of modern life, the privilege should clearly take into account the threat of foreign prosecution.

B. Appellant has demonstrated a real and substantial fear of foreign prosecution.

While conceding the possibility that foreign prosecution may now be relevant, the Supreme Court of New Jersey found that the danger of such prosecution in this case was "too imaginary and unsubstantial to sustain a refusal to answer." In re Zicarelli, 55 N.J. at 270, 261 A.2d at 140. As the following analysis will demonstrate, the court's conclusion was erroneous.

At the hearing before the Superior Court, Zicarelli introduced into evidence numerous newspaper and magazine articles bearing upon his self-incrimination claim. Several of those items were specifically pointed out to the trial court as dealing

with his claimed fear of foreign prosecution.[6] Those articles singled out Zicarelli as the "foremost internationalist" among criminals. Life Magazine, September 8, 1967, p. 101 (App. Ex. WZ-5C; 98a, 160a). The same magazine had this to say:

> "But Zicarelli has an international sideline so extensive that he's practically a one-man state department for the Mob. He has holdings in Venezuela and the Dominican Republic, and throughout the hemisphere is known as the man to see for guns and munitions when a government is to be overthrown or a rebellion is to be put down. For example, through the years he shipped arms to Dominican leaders, selling with fine and profitable impartiality to Trujillo and the men who overthrew him." Life Magazine, September 1, 1967, p. 45 (App. Ex. WZ-5B; 97a, 158a).

Alleging Zicarelli's friendship with former Dominican Republic dictator Rafael Trujillo, Life went on to state that among Zicarelli's favors for Trujillo were the 1952 execution of Andres Requena, an anti-Trujillo exile, in New York, as well as the kidnapping and subsequent disappearance of

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6. The propriety of such articles to demonstrate the reasonableness of the witness' fear of incrimination is beyond question. Hoffman v. United States, 341 U.S. 479 (1950); United States v. Singleton, 193 F.2d 464 (3rd Cir. 1952), rev'd. 343 U.S. 949 (1952); United States v. Marcello, 196 F.2d 436, 440 (5th Cir. 1952); In re Portell, 245 F.2d 183, 185 (7th Cir. 1952); Alexander v. United States, 181 F.2d 480, 484 (9th Cir. 1950); United States v. Weisman, 111 F.2d 260 (2nd Cir. 1940); In re Levinson, 219 F.Supp. 589, 591, 593, (S.D. Cal. 1963).

Jesus De Galindez in New York in 1956. Life Magazine, September 8, 1967, p. 101 (161a).

Life Magazine also alleged that Zicarelli was involved with the manufacture in Canada of Laetrile, a purported cancer drug. The drug was said to be manufactured by Biozymes International and, in an interview with the head of that company, Life was told that the diversion of Laetrile from Canada to the United States was an offense against the Canadian Food & Drug regulations, as well as the similar United States regulations. The subject of the interview also stated that it is illegal to take the drug across the border and that Zicarelli was involved in this smuggling operation. Life Magazine, August 9, 1968, p. 24 (App. Ex. WZ-50; 98a, 170a-172a). Indeed, so well known was Zicarelli's reputation as an "internationalist in crime" that the Commission, at the hearing below, was willing to so stipulate (65a). (Emphasis added.)

Among the questions asked of Zicarelli before the Commission were many relating to his membership and position in the criminal conspiracy referred to as Cosa Nostra (e.g., 8a, 17a, 18a, 20a), including a specific question which inquired as to the geographical area in which Zicarelli had Cosa Nostra responsibilities (31a). While there were no questions referring directly to foreign criminal activity, Zicarelli might well conclude that the questions referred to would furnish a "link in the chain of evidence," Hoffman v. United States, 341 U.S. 479 (1950), leading to a foreign prosecution. As this Court stated in Hoffman, supra at 488, it must be "perfectly clear . . . that the answers cannot possibly have" a tendency to incriminate.

In accordance with the liberal construction given to the "link in the chain" concept, United States v. Chandler, 380 F.2d 993, 997 (2nd Cir. 1967), it is clear that the answers to some of the questions asked of Zicarelli might forge such connecting links to the crimes mentioned in the Life articles.[7]

Thus, considering the worldwide circulation of Life Magazine together with the statutory duties of the Commission to disseminate evidence of wrong-doing to state and federal law enforcement authorities, N.J.S.A. 52:9M-5; 52:9M-6; 52:9m-7; 52:9m-8, it does not take a lengthy stretch of the imagination to forecast that a witness' compelled admissions will eventually find their way into the hands of an interested foreign sovereign.[8]

The vast network of extradition treaties referred to earlier makes the likelihood of eventual prosecution even more of a reality. Canada, the Dominican Republic and Venezuela are all

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7. Even if only one question, out of the series asked by the Commission, was improper, a finding of contempt cannot be sustained based upon those that could have been safely answered. People v. Newmark, 312 Ill. 625, 144 N.E. 338, 341 (Sup. Ct. 1924); Foot v. Buchanan, 113 F.156 (Circuit Ct. N.D. Miss. 1902); Hebebrand v. State, 129 Ohio St. 574, 196 N.E. 912, 416 (Sup. Ct. 1935).

8. One of the alternate bases for the holding in In re Parker, supra, was that, considering the secrecy of federal grand jury testimony, there was little, if any, likelihood that the compelled testimony would find its way into the hands of the Canadian authorities. The statutory scheme of the Commission herein practically insures a contrary result in this case.

signatories to extradition treaties with the United States. Treaties in Force, (Department of State Publication 8567) (1971). Under the agreement with Canada, and the amendments thereto,[9] there are twenty-eight categories of criminal offenses for which Zicarelli could be extradited to Canada. While the agreement with the Dominican Republic[10] covers twenty-six categories of criminal offenses and that with Venezuela[11] covers twenty-three crimes, it does not appear that our citizens could

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9. 8 Stat. 572 (1842); 26 Stat. 1508 (1889); 32 Stat. 1864 (1900); 34 Stat. 1864 (1900); 34 Stat. 2903 (1905); 35 Stat. 2035 (1908); 42 Stat. 2224 (1922); 44 Stat. 2100 (1925). The extraditable offenses are murder, assault with intent to commit murder, piracy, arson, robbery, forgery, uttering forged documents, voluntary manslaughter, counterfeiting and uttering counterfeit money, larceny, receiving stolen goods, fraud by a bailee or trustee, perjury, rape, kidnapping, burglary, revolt, slavery, obtaining money or securities by false pretenses, destruction of railroads, abortion, bribery, bankruptcy offenses, assault upon a law officer, wilful desertion of non-support of a minor dependent, trafficking in narcotics.

10. Stat. 2468 (1909). The extraditable offenses are murder, attempted murder, rape, bigamy, arson, injury to a railroad, crimes at sea, piracy, destroying vessels, mutiny, assaults aboard ship, burglary, felonious entry, robbery, forgery, falsifying official acts, counterfeiting, embezzlement, kidnapping, larceny, obtaining money by false pretenses, perjury, fraud by a bailee or trustee, slavery, accessories. Under the multilateral agreement, 49 Stat. 3111 (1933) any offense which carries a minimum penalty of one year is now extraditable to the Dominican Republic.

11. 43 Stat. 1698 (1922). The extraditable offenses are murder, attempted murder, rape, bigamy, arson, injury to a railroad, crimes at sea, destroying vessels, mutiny, assault on shipboard, burglary, felonious entry, robbery, forgery, forgery of public documents, counterfeiting, embezzlement, kidnapping, larceny, obtaining money by false pretenses, fraud by a bailee or trustee, accessories.

be extradited under the terms of those treaties. Valentine v. United States ex rel Neidecker, 299 U.S. 5 (1936). Nevertheless, the danger with respect to Canada is clear enough, and even with respect to the other two nations Zicarelli could certainly be prosecuted if he ventured to travel there.[12]

In the light of this combination of factors it hardly appears that the danger of foreign prosecution is "imaginary and unsubstantial." Rather, it is suggested that the fear is both "real and appreciable." Murphy v. Waterfront Commission, 378 U.S. 52, 68 (1964). Since no immunity statute in our country, be it state or federal, can protect a witness, such as Zicarelli, from foreign prosecution[13], the only method by which a witness with such a real fear can be protected is by permitting the Fifth Amendment privilege to prevail despite the immunity statute. In such a situation the statute would be void since the jurisdiction would be without power to convey the immunity promised. In this case since the fear of foreign prosecution was genuine Zicarelli's self-incrimination plea should have been sustained.

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12. This would be true as to certain types of offenses even if they were committed in the United States due to the so-called "protective principle" of international jurisdiction. Restatement, Foreign Relations Law of the United States, sec. 33 (1965); Strassheim v. Daily, 211 U.S. 280 (1910).

13. Under this argument the result would be the same whether transactional or use-immunity were granted. Use of the answer could no more be prevented than could prosecution.

Conclusion

Wherefore, for all the foregoing reasons, appellant prays that N.J.S.A. 52:9M-17 be declared unconstitutional under the Fifth and Fourteenth Amendment and that the judgment of the court below be reversed.

Respectfully submitted,

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Appendix A New Jersey Statutes Annotated

TITLE 52, CHAPTER 9M
(L. 1968, c. 266)

STATE COMMISSION OF INVESTIGATION

52:9M-1. Creation of commission; membership; compensation; vacancies

There is hereby created a temporary State Commission of Investigation. The commission shall consist of 4 members, to be known as commissioners.

Two members of the commission shall be appointed by the Governor, one by the President of the Senate and one by the Speaker of the General Assembly, each for 5 years. The Governor shall designate one of his appointees to serve as chairman of the commission.

The members of the commission appointed by the President of the Senate and the Speaker of the General Assembly and at least one of the members appointed by the Governor shall be attorneys admitted to the bar of this State. No member or employee of the commission shall hold any other public office or public employment. Not more than 2 of the members shall belong to the same political party.

Each member of the commission shall receive an annual salary of $15,000.00 and shall also be entitled to reimbursement for his expenses actually and necessarily incurred in the performance of his duties, including expenses of travel outside of

the State.

Vacancies in the commission shall be filled for the unexpired term in the same manner as original appointments. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.
L. 1968, c. 266, §1, eff. Sept. 4, 1968.

Duration of Act:
Section 20 of L. 1968, c. 266, provided: "This act shall take effect immediately and remain in effect until December 31, 1974."

Title of Act:
An Act creating a temporary State Commission of Investigation; prescribing its functions, powers and duties; making an appropriation therefor. L. 1968, c. 266.

52:9M-2. Duties and powers

The commission shall have the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the State, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

c. Any matter concerning the public peace, public safety and public justice.
L. 1968, c. 266, §2, eff. Sept. 4, 1968.

52:9M-3. Investigation of public officers

At the direction of the Governor, or by concurrent resolution of the Legislature the commission shall conduct investigations and otherwise assist in connection with:

a. The removal of public officers by the Governor;

b. The making of recommendations by the Governor to any other person or body, with respect to the removal of public officers;

c. The making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law.
L. 1968, c. 266, §3, eff. Sept. 4, 1968.

52:9M-4. Investigation of departments or agencies

At the direction or request of the Legislature by concurrent resolution or of the Governor or of the head of any department, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, the commission shall investigate the management or affairs of any such department, board, bureau, com-

mission, authority or other agency.
L. 1968, c. 266, §4, eff. Sept. 4, 1968.

52:9M-5. Cooperation with law enforcement officials

Upon request of the Attorney General, a county prosecutor or any other law enforcement official, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties.
L. 1968, c. 266, §5, eff. Sept. 4, 1968.

52:9M-6. Investigations of federal law violations

The commission shall cooperate with departments and officers of the United States Government in the investigation of violations of the Federal laws within this State.
L. 1968, c. 266, §6, eff. Sept. 4, 1968.

52:9M-7. Law enforcement problems extending into other states

The commission shall examine into matters relating to law enforcement extending across the boundaries of the State into other States; and may consult and exchange information with officers and agencies of other States with respect to law enforcement problems of mutual concern to this and other States.
L. 1968, c. 266, §7, eff. Sept. 4, 1968.

52:9M-8. Referral of evidence of officers crime or misconduct to officials for prosecution or removal

Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.
L. 1968, c. 266, §8, eff. Sept. 4, 1968.

52:9M-9. Employment of personnel; duties; compensation

The commission shall be authorized to appoint and employ and at pleasure remove an executive director, counsel, investigators, accountants, and such other persons as it may deem necessary, without regard to civil service; and to determine their duties and fix their salaries or compensation within the amounts appropriated therefor. Investigators and accountants appointed by the commission shall be and have all the powers of peace officers.
L. 1968, c. 266, §9, eff. Sept. 4, 1968.

52:9M-10. Annual report; recommendations; interim reports

The commission shall make an annual report to the Governor and Legislature which shall include its recommendations. The commission shall make such further interim reports to the Governor and Legislature, or either thereof, as it shall deem advisable, or as shall be required by the Governor or by concurrent resolution of the Legislature.
L. 1968, c. 266, §10, eff. Sept. 4, 1968.

52:9M-11. Informing public of commissions activities

By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission. L. 1968, c. 266, §11, eff. Sept. 4, 1968.

52:9M-12. Authority of commission

With respect to the performance of its functions, duties and powers and subject to the limitation contained in paragraph d. of this section, the commission shall be authorized as follows:

a. To conduct any investigation authorized by this act at any place within the State; and to maintain offices, hold meetings and function at any place within the State as it may deem necessary;

b. To conduct private and public hearings, and to designate a member of the commission to preside over any such hearing;

c. To administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers;

d. Unless otherwise instructed by a resolution adopted by a majority of the members of the commission, every witness attending before the commission shall be examined privately and the commission shall not make public the particulars of such examination. The commission shall not have the power to take testimony at a private hearing or at a public hearing unless at least 2 of its members are present at such hearing;

e. Witnesses summoned to appear before the commission shall be entitled to receive the same fees and mileage as persons summoned to testify in the courts of the State.
L. 1968, c. 266, §12, eff. Sept. 4, 1968.

52:9M-13. Construction of sections 2 through 12 of act

Nothing contained in sections 2 through 12 of this act shall be construed to supersede, repeal or limit any power, duty or function of the Executive Department or any other department or agency of the State, or any political subdivision thereof, as prescribed or defined by law.
L. 1968, c. 266, §13, eff. Sept. 4, 1968.

52:9M-14. Cooperation and assistance of state departments and agencies

The commission may request and shall receive from every department, division, board, bureau, commission, authority or other agency created by the State, or to which the State is a party, or of any political subdivision thereof, cooperation and

assistance in the performance of its duties.
L. 1968, c. 266, §14, eff. Sept. 4, 1968.

52:9M-15. Disclosure of name of witness or information

Any person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the Governor or commission, shall be adjudged a disorderly person.
L. 1968, c. 266, §15, eff. Sept. 4, 1968.

52:9M-16. Exhibits; Impounding by court

Upon the application of the commission, or a duly authorized member of its staff, the Superior Court or a judge thereof may impound any exhibit marked in evidence in any public or private hearing held in connection with an investigation conducted by the commission, and may order such exhibit to be retained by, or delivered to and placed in the custody of, the commission. When so impounded such exhibit shall not be taken from the custody of the commission, except upon further order of the court made upon 5 days' notice to the commission or upon its application or with its consent.
L. 1968, c. 266, §16, eff. Sept. 4, 1968.

52:9M-17. Immunity to criminal prosecution or penalty

a. If, in the course of any investigation or hearing conducted by the commission pursuant to this act, a person refuses to answer a question or questions or produce evidence of any kind on the ground that he will be exposed to criminal prosecution or penalty or to a forfeiture of his estate thereby, the commission may order the person to answer the question or questions or produce the requested evidence and confer immunity as in this section provided. No order to answer or produce evidence with immunity shall be made except by resolution of a majority of all the members of the commission and after the Attorney General and the appropriate county prosecutor shall have been given at least 24 hours written notice of the commission's intention to issue such order and afforded an opportunity to be heard in respect to any objections they or either of them may have to the granting of immunity.

b. If upon issuance of such an order, the person complies therewith, he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission; and any such answer given or evidence produced shall be admissible against him upon any criminal investigation, proceeding or trial against him for such perjury, or

upon any investigation, proceeding or trial against him for such contempt.
L. 1968, c. 266, §17, eff. Sept. 4, 1968.

52:9M-18. Partial Invalidity

If any section, clause or portion of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.
L. 1968, c. 266, §18, eff. Sept. 4, 1968.